

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION RECEIVED BY
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IN THE MATTER OF the Joint Application of)
North Western Corporation and Babcock &)
Brown Infrastructure Limited, BBI US Holdings)
Pty Ltd., BBI US Holdings II Corp., and BBI)
Glacier Corp. for Approval of the Sale and Transfer)
of North Western Corporation Pursuant to a Merger)
Agreement)

PUBLIC SERVICE
UTILITY DIVISION
COMMISSION

DOCKET NO. D2006.6.82

**POST-HEARING BRIEF OF
HUMAN RESOURCE COUNCIL, DISTRICT XI,
RENEWABLE NORTHWEST PROJECT, AND
NATURAL RESOURCES DEFENSE COUNCIL**

Human Resource Council, District XI, Renewable Northwest Project, and Natural Resources Defense Council intervened in this merger and sale proceeding for two reasons. First, we sought to remedy an on-going and systemic problem with decision-making at North Western Energy (NWE), namely the fact that authority at the utility is divided between Sioux Falls and Butte. Second, we thought it important to raise, for both the Commission's and the company's consideration, issues related to the acquisition of additional renewable resources and efficiency, the delivery of low-income services, and the adoption of responsible policies on global warming.

As to the former, we acknowledge and appreciate the commitment of the joint applicants, NWE and Babcock and Brown Infrastructure (BBI), to either move corporate headquarters to Montana or to establish a stand-alone Montana entity at the conclusion of the 3-year arrangement with South Dakota. We believe this decision constitutes a good faith effort by the joint applicants to get things off on the right foot, assuming the

Commission allows this transaction to proceed, and evinces an awareness on the part of NWE as to some of its past difficulties and a willingness to confront those problems. We look forward to working with the utility (whatever the outcome of this proceeding) to ensure the delivery of reasonably priced, environmentally responsible energy supplies for Montana customers.

Similarly, we also hope to work with joint applicants concerning those overarching policy issues – mentioned above – that the utility must confront. We think that the development of responsible social and environmental policy not only garners good-will for the utility (which NWE sought to mine by running full page ads in Montana newspapers on Earth Day extolling its record on the environment) but will produce economic benefits for both the utility and its customers.

Note that we did not, with respect to these issues, seek to extract a *quid pro quo* from the joint applicants, nor did we seek to have the Commission condition any approval to address our concerns. In the future, however, in appropriate proceedings and circumstances we will press for acquisition of new renewable resources and investments in efficiency, for a strengthened utility commitment to the provision of low-income services, and, as other utilities have done, for the adoption of responsible policies to address climate change and we will seek to constructively engage with NWE on all of these matters.¹

¹ In this regard and following-up on a question to Ms. Gravatt from Commissioner Raney (transcript, vol. 2 at 97), we believe that rather than conditioning approval of this application on a carbon capture and disposal requirement for new coal resources, it is better practice for the Commission to impose such a requirement in the context of utility resource planning or a specific resource procurement proceeding.

1. The Joint Applicants' Arguments Over the Commission's Legal Authority to Review the Sale and Merger Application Should be Disregarded

In its brief the joint applicants assert that the Commission "does not have the legal authority to approve or disapprove the acquisition of NorthWestern by BBI...."

Applicants Opening Brief at 5. To say the least, this is a peculiar argument and need not cause the Commission to pause in its deliberations. The joint applicants filed an application seeking Commission approval of this merger and sale and have prosecuted their case with diligence and with vigor. Up to now, there has been no suggestion by either NWE or BBI that the Commission's jurisdiction over this matter is somehow limited.²

It's possible that, as a legal matter, the joint applicants are estopped from making this threshold argument at this late date. At a minimum, however, there is something perverse, having submitted to the jurisdiction of the Commission, for NWE and BBI to cast a cloud over the Commission's authority and suggest that if a positive result (from their perspective) is not forthcoming they are not without legal recourse. In the end we expect that the Commission will take an appropriately broad view of its obligation to protect the public interest. We encourage the Commission not to be swayed by what are, basically, gratuitous comments by the joint applicants about the extent of Commission authority.

² Indeed, during the hearing Mr. Garland was asked by counsel for the Large Customer Group whether the joint applicants had a position on this issue. But Mr. Garland disclaimed any knowledge of the subject and subsequent objections prevented further inquiry. Transcript vol. 1 at 202-207.

2. The Commission Should Consider Issues Related to Its Ability to Regulate and the Consequences if the Sale and Merger to BBI are not Consummated

With respect to the ultimate issue in this proceeding, namely whether to approve or disapprove this application, we have taken no position. Instead, we suggest a few key points for the Commission to consider in making its decision.

First, the Commission should assure itself that it is able to exercise sufficient regulatory authority and oversight over the new utility. If it can not assure itself of this the Commission must reject the application because to do otherwise would be an abdication of its responsibilities. In his testimony, Dr. Power laid out the proper standard:

What you want to focus on ... is can you get valuable information? Can you hold people responsible? Can you keep assets from being bled away from the operating utility here? That's what you have to ask, is whether the arrangement is such that you can continue to regulate.

Transcript, vol. 2 at 87.

Second, the Commission should consider what happens if this merger/sale does not proceed. There is uncontroverted evidence in this proceeding both from Dr. Power (transcript, vol. 2 at 86) and public testimony from Mr. Everett³ (transcript, vol. 1 at 221) that if the merger/sale does not go forward the owners of NorthWestern Corporation will, in all likelihood, seek to have the company sold. *See also* Hanson testimony, transcript vol. 2 at 225 (if the merger is not approved, resulting in a loss of share price “[there will be] a significant number [of stockholders] that will begin to pressure the company for some way to recoup their losses”). Consequently, at some point, in the not so distant future, the parties might find ourselves back before the Commission in yet another

³ Mr. Everett represents Amber Capital, which, as of February 2007, owned approximately 1.3 million shares of NorthWestern Corporation, or 5% of the company, with a market value of \$46.5 million. Data Request, MCC-134, transcript, vol. 1 at 219.

proceeding that considers the fate of NWE. In the intervening years, however, time will have been lost that could have been used rebuilding the utility and putting it on a sound financial footing, NWE will have been in limbo, and competing concerns will prevent management from focusing on the day-to-day details of utility operation.

Inevitably there are uncertainties associated with any Commission decision. It is the Commission's task to identify the path associated with the least risk. Clearly, one of the factors in assessing risk is what the future holds for NWE if this transaction is not approved.

Respectfully submitted,

A handwritten signature in cursive script, reading "Charles E. Magraw", followed by a long horizontal flourish line.

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